No. 21742

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BUTCHERS' UNION LOCAL NO. 120, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GARY GREEN,
Attorney,

National Labor Relations Board.

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JURISDICTION

This case is before the Court upon the petition of the Board for enforcement of its order (R. 30-37)[1]

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[1] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of the Court's rules. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. "GX" refers to the General Counsel's exhibits; "RX" refers to respondent's exhibits.

issued against respondent on September 29, 1966, and reported at 160 NLRB No. 114. The Board's order resulted from routine proceedings under the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). This Court has jurisdiction, since the unfair labor practice occurred in Oakland, California.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent violated Section 8(b)(7)(C) of the Act by picketing an employer with an object of forcing or requiring him to recognize and bargain with respondent as the collective bargaining representative of his employees without filing a petition for a Board election under Section 9(c) of the Act within a reasonable period of time from the commencement of the picketing. The evidence upon which the Board based its finding is summarized below.

John Pacheco, the sole owner of M. Moniz Portuguese Sausage Factory, is engaged in the manufacture and sale of sausages at Oakland, California (R. 12, 31). Pacheco himself directs the business; in addition, at all material times, three men were engaged in the factory as production and maintenance workers and one outside truckdriver handled the wholesale sale and delivery of sausages (R. 14, 31; Tr. 49). Of the three production workers, two were sons-in-law of Pacheco (R. 14; Tr. 49). The third was not actually a relative, but Pacheco was godfather to his five children *(ibid.)*. Pacheco paid him a salary of $125 a week

(R. 33; Tr. 54). In addition, Pacheco paid him and his other employees, from time to time, additional sums from the business as a reimbursement for medical, dental, hospital, automobile and other expenses. There was, however, no partnership agreement or any other arrangement whereby these individuals were entitled to a certain percentage of profits. (R. 33; Tr. 52-53.)

No pension fund arrangement exists but Pacheco makes appropriate deductions for Social Security and Workmen's Compensation (R. 33; Tr. 50-51). Pacheco explained at the Board hearing that he had a close working relationship with all his employees:

> We hold meetings and try to save here and there. We discuss the business in general. I don't make the decisions alone. I discuss them with them. [Tr. 53.]

But, if a dispute arises, it is Pacheco who makes the ultimate decision (Tr. 54).

During late 1964, Sylvan Thornton, a Union officer, visited Pacheco and told him that he wanted to "unionize the shop." Pacheco replied that "that was all right" and invited Thornton to "go back and talk to the employees and if they agreed it was fine." Thornton refused, and insisted that he was going to talk only to Pacheco (R. 13; Tr. 33). Pacheco, however, refused to recognize the Union unless his employees consented.

On September 30, 1965, Thornton visited Pacheco again and insisted that he sign a contract with the Union. Again, Pacheco told him to talk to the em-

ployees and stated that ". . . if they wanted the Union, I would agree." Thornton answered that he was not interested in talking to employees (R. 13; Tr. 36-37). When Pacheco refused to sign, Thornton said that he could make things unpleasant (R. 32; Tr. 16). Pacheco asked Thornton to explain the details of the Union contract and Thornton left but promised that the document would be brought to Pacheco (R. 13; Tr. 37). Within a few days, the Union had pickets outside the Company's premises. See p. 5, *infra*.

Union business agent Finney came to Pacheco's shop on October 13, 1965, and showed him a contract, but Finney declined to discuss its contents on the grounds that Thornton had ordered him "not to talk" (Tr. 38). The next day, after speaking to a labor relations consultant, Pacheco telephoned Thornton and asked him to come to his shop with a contract and to explain it because he "was interested in the details" (Tr. 41). When Thornton appeared, however, and the two men sat down with the document before them, Thornton declined to discuss the matter any further: he told Pacheco that he had already left the agreement, that Pacheco had already read it, and that "there was nothing to explain, but to sign the contract" (Tr. 42).

Pacheco replied, "Okay, my back's against the wall" and asked Thornton to date and execute the contract. When Thornton complied and returned the signed document to Pacheco, Pacheco put it in his office safe, locked the door, and refused to return it to the irate business agent (R. 14; Tr. 42).

Meanwhile, the Union had commenced picketing at Pacheco's premises, on October 1 or 4, 1965. The picket signs bore the following legend:

MONIZ LINGUICA
UNFAIR

THE EMPLOYER PROVIDES WAGES AND WORKING CONDITIONS FOR EMPLOYEES BELOW PREVAILING STANDARDS ESTABLISHED BY BUTCHERS 120
PLEASE DO NOT BUY PRODUCTS PREPARED, PROCESSED AND PACKAGED BY THE ABOVE EMPLOYER, UNDER THE BRAND NAME OF MONIZ

Picketing continued intermittently until December 15, 1965 (R. 32; Tr. 6).[2]

On November 8, 1965, Pacheco filed the instant Board charges and a petition for a representation election (R. 32; Tr. 7). On December 23, 1965, the Company requested that its petition for an election be withdrawn on the grounds that by this time the Union had disclaimed any interest in representing the employees (R. 13, 32; RX 3). The request was approved by the Board's Regional Director who noted

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[2] On December 20, 1965, the United States District Court for the Northern District of California issued a temporary injunction pursuant to Section 10(1) of the Act. *Hoffman* v. *Butchers' Union, Local No. 120, etc.*, Civil No. 44496.

that the Union had, in fact, made such a disclaimer after Board proceedings herein had commenced *(ibid.)*.

II. The Board's Conclusions and Order

The Board found that an object of respondent's picketing was to force or require the Company to recognize and bargain with the Union, although it was never the certified representative of the Company's employees (R. 34). The Board further found that no representation petition was filed "within . . . thirty days from the commencement of such picketing" *(ibid.)*. Accordingly, the Board concluded that respondent violated Section 8(b)(7)(C) of the Act and ordered respondent to cease and desist therefrom and to post an appropriate notice (R. 35-36).

ARGUMENT

I. Substantial Evidence Supports the Board's Finding That Respondent's Picketing Was for an Object Proscribed in Section 8(b)(7)

The Congressional restrictions imposed upon picketing by an uncertified union, in Section 8(b)(7), apply only where "an object thereof" is to force an employer to recognize or bargain with a union, or to force employees to accept such union as their collective bargaining representative. The threshold issue in this case, therefore, is whether there is adequate evidentiary support under the applicable standards of judicial review [3] for the Board's finding that the pick-

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[3] See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474; *N.L.R.B.* v. *Carpenters Local No. 2133*, 356 F. 2d 464 (C.A. 9).

eting in this case was for such an object. In attacking this Board finding, respondent has contended that the sole object of the picketing was merely to publicize the "substandard" working conditions of Pacheco's employees.

In the Board's view, picketing to induce an employer to raise wage rates up to area standards need not be equated with a recognition or organization object. *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321, 322-323; *Local 741, Plumbing and Pipefitting etc. (Keith Riggs)*, 137 NLRB 1125; see *Carpenters Local No. 2133, supra*, 356 F. 2d at 466 n. 1. The question of whether a proscribed object exists must be determined by the Board on the facts of each case.

In this case, the record amply supports the Board's determination: picketing began immediately after Pacheco had refused the Union's September 30 demand to sign a collective bargaining contract, and after Union agent Thornton had threatened to make things "unpleasant" for Pacheco if he refused. It is true that the picket signs themselves did not expressly call out for recognition but this obviously cannot preclude the Board from drawing an appropriate inference from all the surrounding circumstances. *N.L.R.B.* v. *Local 182, Teamsters*, 314 F. 2d 53, 58 (C.A. 2). There is nothing in the record to show that the Union had any genuine concern about the nature of the working conditions among Pacheco's employees; indeed, there is no evidence that the Union even knew

what they were.[4] It is clear that Union officials repeatedly refused to talk about the benefits of organization with the *employees;* they insisted instead on dealing with "the owner" (*supra,* pp. 3-4). And all the testimony in the record relating to those dealings shows that the Union wanted recognition; there was never any inquiry about existing working conditions.

In these circumstances, the Board's finding of a Section 8(b)(7) object is plainly entitled to affirmance. *N.L.R.B.* v. *Carpenters Local No. 2133, etc.,* 356 F. 2d 464 (C.A. 9); *N.L.R.B.* v. *Local Joint Executive Board of Hotel and Restaurant Employees,* 301 F. 2d 149, 153-154 (C.A. 9); *Centralia Building and Construction Trades Council* v. *N.L.R.B.,* 363 F. 2d 699 (C.A. D.C.); *N.L.R.B.* v. *Sapulpa Typographical Union No. 619,* 321 F. 2d 771, 774 (C.A. 10); *N.L.R.B.* v. *Bldg. & Const. Trades Council of Philadelphia,* 359 F. 2d 62, 63 (C.A. 3).[5]

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[4] During the conversation between Pacheco and Finney on October 13, 1965, the record shows that Finney did accuse him of "not paying Union scale" (Tr. 39). But when Pacheco protested—"How do you know? Have you seen my payroll, my books?"—Finney backed down and conceded, "I can't talk to you. I don't know nothing" (Tr. 39).

[5] The Board is not required, of course, to find that recognition was the *only* object; the Act applies when this is *an* object. *Local 182, Teamsters, supra,* 314 F. 2d at 58-59; *Penello* v. *Retail Store Employees,* 188 F. Supp. 192, 199 (D.C. Md.), aff'd 287 F. 2d 509 (C.A. 4); *Local 705, Teamsters* v. *N.L.R.B.,* 307 F. 2d 197, 198 (C.A. D.C.). Accordingly, no defense would be proved even if it were shown that the Union *also* sought to create some notoriety about Pacheco's employees' working conditions.

Before the Board, respondent contended that the Trial Examiner had erred in failing to find "entrapment" (R. 29). According to respondent, Pacheco duped the Union into delivering a signed bargaining contract on October 14, which Pacheco then secreted for use as evidence against the Union in these proceedings. But the charge of entrapment must fail. The record does not show that Pacheco did anything to initiate the discussions about a collective bargaining contract or to induce the Union to engage in any conduct which would misrepresent its true object. At the worst, Pacheco's conduct did not "trap" the Union by creating a false impression of the Union's object but only by creating a situation in which written evidence of its true object could be obtained. Besides, the Board pointed out that it was not relying upon this written evidence, in any event. The signed contract which Pacheco had obtained was, after all, unnecessary, and the Board rested its finding of object on the Union's earlier demand for recognition (R. 34, n. 5). It was undisputed at the Board hearing that the Union had demanded, on September 30, 1965, that Pacheco sign a contract or else face "unpleasant" consequences.[6]

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[6] Nor did the Board rely upon the evidence of a 1964 demand for recognition (*supra*, p. 3). This episode occurred more than six months before the instant unfair labor practice charge was filed and was before the Board solely for background purposes (Tr. 32-33). See *Local Lodge No. 1424* v. *N.L.R.B.*, 362 U.S. 411, 416.

II. The Board's Policy Against Finding a Section 8(b)(7)(C) Violation Where the Bargaining Unit Consists of Only One Employee Is Inapplicable Here Since the Board Properly Found That the Unit Sought in This Case Consists of More Than One Employee

Section 8(b)(7)(C) was designed to shield employers and employees from the adverse effects of prolonged recognition picketing and to provide a procedure whereby the underlying representation question may be resolved in a prompt and orderly fashion. To this end, the statute bars recognition picketing for more than a reasonable period of time not to exceed 30 days unless a representation petition is filed within that period. If a petition is filed, the Board conducts an expedited election in which employees can freely register their choice. If the vote is prounion, a certification will issue and Section 8(b)(7)'s restraints are inapplicable; if the employees reject the union, Section 8(b)(7)(A) bars recognition picketing for a period of 12 months. See generally, *Local 182, Teamsters, supra*, 314 F. 2d at 58; *Department & Specialty Store Employees, Local 1265* v. *N.L.R.B.*, 284 F. 2d 619, 625-626 (C.A. 9); *N.L.R.B.* v. *Lawrence Typographical Union No. 570*, —— F. 2d ——, 65 LRRM 2176 (C.A. 10); *Dayton Typographical Union No. 57* v. *N.L.R.B.*, 326 F. 2d 634 (C.A. D.C.).

The Board regards this statutory scheme as inapplicable where a one-man unit is involved, because the election and certification procedures are unavailable in such a case. Since the Board will not conduct elections or otherwise compel bargaining for a one-man unit (*Luckenbach Steamship Co.*, 2 NLRB 181; *Al &*

Dick's Steak House, Inc., 129 NLRB 1207), a union claiming recognition is disabled from invoking election procedures through no fault of its own. Accordingly, the Board held in *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588, 61 LRRM 1386, that:

> . . . it would be inequitable and, we believe, not within the intention of Congress, to condition the lawfulness of the recognitional picketing in a one-man unit on the union's filing of a petition since, if such petition were filed, it would be dismissed.

In this case, the Trial Examiner recommended that the complaint be dismissed because he deemed the *Vila-Barr* case controlling: "I find that only one of the persons working at Pacheco's store, the truck-driver, was an employee within the meaning of the Act" (R. 17). The Board disagreed, concluding that there were at least two employees in the unit, i.e., the truckdriver and the production employee not related to Pacheco (R. 33). Accordingly, *Vila-Barr* was distinguishable and Section 8(b)(7)(C) applied here. We now show that the Board's determination is reasonable and proper.

First, there is no question about the truckdriver's "employee" status: this issue was determined adversely to respondent by the Trial Examiner and no relevant exceptions were taken (R. 33, n. 2). See Section 10(e) of the Act, which provides, in relevant part, that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neg-

lect to urge such objection shall be excused because of extraordinary circumstances." Second, and for similar reasons, no contention may be raised here that any of the three production workers were "supervisors" within the meaning of Section 2(11) of the Act and thereby excluded from employee status (R. 32). Third, the Board assumed, for purposes of this case, that the two production employees who were sons-in-law of Pacheco would be excluded from the bargaining unit, as a matter of policy, in part because of their familial relationship to the employer (R. 33, n. 3). See *International Metal Products Co.*, 107 NLRB 65, 67, excluding employer relatives who enjoy a special status, aligning them with management, because of their family relationship.[7] In light of these preliminary considerations, it is clear that respondent's *Vila-Barr* defense rests solely upon the contention that the third production worker—unnamed in the record—is not entitled to the status of "employee" as defined in Section 2(3) of the Act. The Board properly rejected this contention.

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[7] But see *Browne and Buford,* 145 NLRB 765, 768, where an employee who was the son-in-law of the employer was included in the unit because there was no evidence that he enjoyed a "special status" by virtue of his familial relationship. As the cited cases illustrate, the Board may exercise its discretion under Section 9 to exclude certain individuals from a bargaining unit even though they have employee status. Under Section 2(3), only an "individual employed by his parent or spouse" is deprived of employee status. *Yoshio Uyeda* v. *Brooks,* 365 F. 2d 326, 328-330 (C.A. 6). Therefore, the statute itself does not require a son-in-law to be deprived of the benefits of the Act.

Section 2(3)[8] embodies a Congressional determination that the solutions to national labor problems provided in the Act should be made available in a very broad fashion. The term employee, Congress stated, includes "any employee" except for those individuals specifically exempted, i.e., agricultural and domestic workers, independent contractors and supervisors, and employees of exempt employers. Attempts to deprive other workers of the coverage of the Act stand on an unfirm footing when such workers "are subject, as an economic fact, to the evils the statute was designed to eradicate and . . . [when the Act's] remedies . . . are appropriate for preventing them or curing their harmful effects in the special situation." *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 127; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 185-186, 191-192. For as the Supreme Court has explained, the term employee in Section 2(3):

> . . . must be understood with reference to the purposes of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given. [*Hearst Publications*, *supra*, 322 U.S. at 129.]

In 1947, Congress overruled the substantive holding of the *Hearst* decision by adding the specific exemption for independent contractors now present in the Act. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481. But there is no basis for reading the 1947

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[8] Its full text appears *infra*, p. 25.

amendment as a general legislative mandate to construe Section 2(3) narrowly, or to deprive employees like the one involved here of Section 2(3) status. House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 18; Volume I, Legislative History of the Labor Management Relations Act, 1947, p. 309 (hereinafter referred to "Leg. Hist. '47"). Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess., pp. 32-33; I Leg. Hist. '47, pp. 536-537.

On the contrary, the Supreme Court's general approach to the interpretation of the term "employee" in *Hearst* remains in effect and federal court decisions after 1947 repeatedly illustrate that the Act still embodies a Congressional effort "to find a broad solution, one that would bring industrial peace by substituting, as far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails when these rights are not effectively established." (322 U.S. at 125).[9]

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[9] *Jas. E. Matthews & Co.* v. *N.L.R.B.*, 354 F. 2d 432, 435 (C.A. 8); *Local 28, IOMMP* v. *N.L.R.B.*, 321 F. 2d 376, 377 (C.A. D.C.); *N.L.R.B.* v. *Lee-Rowan Co.*, 316 F. 2d 209, 212 (C.A. 8), cert. denied, 375 U.S. 827; *N.L.R.B.* v. *Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983, 985-987 (C.A. 7), cert. denied, 335 U.S. 845; *N.L.R.B.* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), cert. denied, 342 U.S. 919; *Amalgamated Meat Cutters, etc. Local 88* v. *N.L.R.B.*, 237 F. 2d 20, 23 (C.A. D.C.), cert. denied, 352 U.S. 1015; *N.L.R.B.* v. *A. S. Abell Co.*, 327 F. 2d 1, 3-4 (C.A. 4); *Minnesota Milk Co.* v. *N.L.R.B.*, 314 F. 2d 761, 764-765 (C.A. 8) and cf. *N.L.R.B.* v. *Monterey County Bldg. & Const. Trades Council*, 335 F. 2d 927, 930, n. 4 (C.A. 9).

Protection is obviously required here. Those who work for Pacheco, like any undisputed "employee", are subject to the very pressures generated by recognition picketing which led Congress to enact Section 8(b)(7). It would be difficult to imagine why Congress would have deprived the unnamed production worker in this case of the Act's protection against such picketing, or to suppose that, in this case, Congress was somehow more willing to permit a representation question to be resolved by picketing instead of by a free election. Indeed, respondent has not even suggested that any pragmatic reasons exist to support such disparate treatment. It is true, of course, that this individual enjoys a close working relationship with Pacheco; he is consulted on business decisions and he receives reimbursement for certain personal expenses in addition to his fixed weekly salary (*supra*, p. 3). But that is hardly a reason for supposing that Congress would not have extended the protections of the Act to him. Indeed, the unfair labor practice section of the Act itself demonstrates that Congress intended the benefits of the Act to extend equally to those who work for a paternalistic employer. See Section 8(a)(2); *IAM Lodge No. 35* v. *N.L.R.B.*, 311 U.S. 72, 80; *N.L.R.B.* v. *Stow Mfg. Co.*, 217 F. 2d 900, 904 (C.A. 2), cert. denied, 348 U.S. 964; and cf. *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405; *ILGWU* v. *N.L.R.B.*, 339 F. 2d 116 (C.A. 2). In short, if the term employee is construed here—as it must be—in light of the remedial purposes to be served by the Act and the facts of the economic rela-

tionship involved, there is simply no basis for depriving the unnamed production worker of coverage.[10]

To be sure, the Trial Examiner found that this worker's relationship to Pacheco "did not meet the definition of an employer-employee relationship" (R. 17). But as the Board pointed out, his reasoning "does not give due consideration to the record as a whole and to all the factors which are relevant to the question of employee status" (R. 33).

The Trial Examiner failed, in the Board's view, to give appropriate weight to the following evidence indicating employee status: the employer himself considers this worker one of his "employees" (Tr. 54), pays him a weekly salary in a fixed amount in exchange for labor provided, makes Social Security deductions and provides Workmen's Compensation coverage, and reimburses him by check for medical and certain other expenses (*supra*, pp. 2-3).

Further, the Examiner plainly allotted too much significance to the fact that these reimbursements were made from the profit of the business, since—as the Examiner himself acknowledged—"a profit-sharing plan may of course include employees" (R. 17).[11]

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[10] The fact that Pacheco was the godfather of this employee's children is not material. The restriction of the statute is inapplicable because it only requires exemption for an "individual employed by his parent or spouse." And the Board has never, in the course of fashioning unit exclusions based upon special family relationship, excluded any individual because of the "distant and indirect" (R. 33, n. 3) kind of relationship involved here.

[11] Moreover, as the Board pointed out (R. 33), there would be no evidentiary basis here for a finding that the production

Finally, the Examiner deemed it significant that the production worker "had authority effectively to make recommendations which were more than routine and clerical" (R. 17) with respect to management decisions including such matters as the hiring of employees and the purchasing of supplies. But as the Board pointed out, there is no evidence to support a finding that this worker exercised any independent judgment on these matters (R. 33). The record simply shows that Pacheco, who retained power to make the ultimate decisions (Tr. 54), "discussed the business" with his employees and elicited suggestions from them (Tr. 53). There is nothing in the record to suggest that any worker on Pacheco's payroll ever made an independent decision to hire or fire anyone, or to change suppliers or operating procedures. But it would surely be an unusual small business operation if the employer failed to consult, as Pacheco did, with those who were doing the work for him.

Finally, the Examiner tacitly acknowledged that no one of the factors he had relied upon would support a finding of exemption from the Act's coverage, but concluded that all of them combined created a unique arrangement outside the reach of the statute.

> The arrangement has some of the aspects of a communal compound, some of *de facto* partner-

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worker's expenses were paid for through a profit-sharing arrangement, since the record clearly shows that the reimbursements involved were made at the employer's discretion, and not based upon any contractual right of the recipient (*supra*, p. 3).

> ship. However described it did not meet the definition of an employer-employee relationship contemplated by the Act. [R. 17.]

But as we have already seen, some of these "aspects" represented factual findings unsupported by the record; others were simply features commonly found in many employment relationships. The Board, therefore, could properly reject this overall view, especially since the Examiner had ignored or given inadequate significance to the existing, traditional, indicators of an employment relationship in this record. Furthermore, the fact that the employment relationship involved here may be unique or unusual is hardly a reason to deny it the coverage of the Act. Indeed, one of the major reasons leading to the Board's creation was the judgment of Congress that a completely definitive catalogue of the situations covered by the Act could not be enacted but would have to await administration of the Act by an expert and experienced agency. *Hearst*, *supra*, 322 U.S. at 128-130; *Phelps Dodge*, *supra*, 313 U.S. at 191-194. It is therefore a traditional and essential task of the Board to determine whether the broad statutory terms cover a particular unique situation; the Board would hardly be fulfilling its mandate if it stayed its processes simply because the situation before it was characterized by atypical features.

Moreover, and even if the Board's substantive analysis and conclusion were less persuasive, procedural considerations relating to the burden of proof and scope of judicial review would amply justify an en-

forcement decree here. Thus, as this Court has recently pointed out, the Act:

> . . . was designed to include all employees not specifically excepted . . . [and] the party claiming an exemption has the burden of proving that it comes within the exemption." [*N.L.R.B.* v. *Monterey County Bldg. & Const. Trades Council*, 335 F. 2d 927, 930, n. 4.]

Yet respondent here, the party claiming the exemption, did not call any witnesses to support its contention but relied solely upon the technique of posing leading questions during cross-examination of the General Counsel's witnesses. The Board was surely entitled to discount the probative weight of affirmative answers to such questions as this, for example:

> So the decisions of the business are made as a sort of counseling within the family circle? [Tr. 50.]

The existence of a "family circle," or, to put it in the terms used by the Examiner, "a communal compound," was obviously a matter to be proved by detailed explication of all the circumstances; no witness was capable of resolving that question by a simple "yes" or "no" answer. At the least, therefore, respondent is not entitled to the exemption because it has hardly sought to meet its evidentiary burden.

In any event, the applicable principles of judicial review strongly militate against upsetting the Board's decision on this kind of issue:

> . . . it is elementary that the Board has the duty of determining in the first instance who is an

> employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. [*N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398, 403.]

Or, as the Supreme Court stated in *Hearst*, *supra*, 322 U.S. 111:

> . . . where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited . . . the Board's determination that specified persons are "employees" under the Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.[12]

Accordingly, whether or not the Court would have decided this issue—i.e., whether the production work-

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[12] The 1947 Taft-Hartley amendment, designed to exclude independent contractors from the coverage of the term "employee", did not alter that aspect of the *Hearst* case which articulated the applicable standard of judicial review. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487-488; *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 49-50; *N.L.R.B.* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 269; *N.L.R.B.* v. *Kohler Co.*, 351 F. 2d 798, 802 (C.A. D.C.); and see also, discussing the same standard of review in connection with the interpretation of other broad statutory terms, *Trans-Pacific Freight Corp. of Japan* v. *Federal Maritime Comm.*, 314 F. 2d 928, 935 (C.A. 9) ("employed by"); *Local 182, Teamsters, supra*, 314 F. 2d 53, 58 ("picketing"); *N.L.R.B.* v. *Randolph Elec. Membership Corp.*, 343 F. 2d 60, 62 (C.A. 4) ("political subdivision"); *Miami Newspaper Pressmen's Local No. 46* v. *N.L.R.B.*, 322 F. 2d 405, 409 (C.A. D.C.) ("allied employer").

er was an "employee"—as the Board did had the issue been before the Court *de novo*, the Board's decision is entitled to be accepted under the limited scope of review.[13]

III. Respondent's Reliance Upon the Supreme Court's *Tree Fruits* Decision Is Misplaced

Before the Board, respondent argued that its picketing could not be prohibited because of the policy of immunity for certain "consumer picketing" articulated by the Supreme Court in *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits Labor Relations Committee, Inc.*, 377 U.S. 58. But respondent's reliance upon *Tree Fruits* is, as the Board held (R. 34, n. 4), clearly misplaced.

The issue in *Tree Fruits* arose under a different subsection of the Act, where different considerations applied. There, the union involved picketed at a retail food market in order to persuade the customers of the market not to buy a particular product on sale. The union had no independent labor dispute with the re-

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[13] The disagreement between the Board and the Examiner plainly had nothing to do with witness credibility or testimonial conflicts. As we have already shown, pp. 16-18, the Board generally disagreed with the Examiner's legal analysis and his implicit policy views; in addition, the Board on occasion took a different view of the inferences properly to be drawn from the record. It follows, therefore, that the disagreement between the Board and the Examiner does not materially detract from the support for the Board's determination. Compare *Universal Camera Co.* v. *N.L.R.B.*, 340 U.S. 474, 495, and *N.L.R.B.* v. *Pyne Molding Corp.*, 226 F. 2d 818, 819 (C.A. 2) with *Pittsburgh-Des Moines Steel Co.* v. *N.L.R.B.*, 284 F. 2d 74, 87 (C.A. 9).

tailer, but was on strike against a producer of the product. The question posed was whether Section 8(b)(4)(B)'s prohibition against secondary boycotts was violated by such picketing and the Supreme Court held that that Section of the Act was not violated where the union limited its picketing of the retail store "to an appeal to the customers of the stores not to buy the products of certain firms against which [the union] . . . was on strike." In other words, picketing—even at a neutral employer's premises—aimed solely at persuading retail customers not to buy a particular product was deemed outside the scope of Section 8(b)(4)(B)'s prohibition.[14]

But this case involves Section 8(b)(7), which aims at a different problem. Section 8(b)(4)(B) was designed to confine the pressures of a labor dispute to its immediate disputants, and to insulate neutral employers and employees against certain forms of union conduct—including picketing—designed to conscript them into a boycott of the union's real adversary.

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[14] See *N.L.R.B.* v. *Millmen & Cabinet Workers Union, Local No. 550*, 367 F. 2d 953, 955-956 (C.A. 9); *N.L.R.B.* v. *Local 254, Bldg. Service Employees*, 359 F. 2d 289, 292 (C.A. 1); *N.L.R.B.* v. *Bldg. Service Employees Int'l Union, Local No. 105*, 367 F. 2d 227 (C.A. 10) for cases interpreting and applying the *Tree Fruits* doctrine. As these cases show, a "mere facade" of consumer picketing (*Millmen, supra*, 367 F. 2d at 955) cannot preclude the Board from finding a Section 8(b)(4)(B) violation: the union must make it clear that its conduct at the secondary employer's premises is strictly limited to discouraging purchases of the objectionable product and does not amount to a "veiled coercion" (*Millmen, supra*, 367 F. 2d at 956) of the secondary employer.

N.L.R.B. v. *Denver Building Trades Council*, 341 U.S. 675, 692; *Local 761, Int'l Union of Electrical Workers* v. *N.L.R.B.*, 366 U.S. 667, 671-674; *Tree Fruits*, *supra*, 377 U.S. at 63-64. Section 8(b)(7), however, constitutes a direct regulation of "picketing"—even where it is confined to the primary employer—"where an object thereof is [recognitional or organizational]." We have already shown, *supra*, pp. 6-9, that the Board could properly find a recognition object in respondent's picketing. It follows that the *Tree Fruits* doctrine of immunity is plainly inapplicable. Thus, we need not determine here if the Union's picketing sufficiently conforms to *Tree Fruits* standards so as to constitute primary action. Since no Section 8(b)(4)(B) charge is involved here, we may assume that the Union's conduct was primary. The only real question is whether an object of its picketing was to compel recognition.[15] *Lawrence Typographical Union*, *supra*, 65 LRRM at 2183; cases cited *supra*, p. 22, n. 14.

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[15] That the Union may have *also* sought to discourage retail purchases from the Company is, if true, immaterial. One unlawful object warrants Section 8(b)(7)'s application. See cases cited *supra*, p. 8, n. 5.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.[16]

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GARY GREEN,
Attorney,

National Labor Relations Board.

June 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

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[16] In its brief to the Trial Examiner, respondent argued that the representation petition filed by the Company on November 8 constituted a timely petition within the meaning of Section 8(b) (7) (C). But it was stipulated at the hearing that picketing began on October 1 or 4 (Tr. 6). Obviously, therefore, and quite apart from the problems raised by the Company's subsequent withdrawal of the petition and the Union's consent thereto (see *Dayton Typographical, supra,* 326 F. 2d at 645-646), it is clear that no petition was filed "within a reasonable period of time not to exceed thirty days from the commencement of the picketing."

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer herein defined.

* * * *

SEC. 8 (b) It shall be an unfair labor practice for a labor organization or its agents . . .

* * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain

with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act, (B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this para-

graph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

* * * *

SEC. 10 . . .

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code, Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and theerupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that

there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

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General Counsel's Exhibits

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3	42	43	44

Respondent's Exhibits

No.	Identified	Offered	Received in Evidence
1, 2	8	8	8
3	10	9	10

WITNESSES FOR THE GENERAL COUNSEL

	Direct	Cross	Redirect	Recross
Brenda Correia	14	24	31	
Joan Pacheco	32	44	52	54

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